

Summary of Testimony of David D. Doniger
Policy Director, Climate Center
Natural Resources Defense Council

- NRDC appreciates the Committee's commitment to producing global warming legislation to reduce CO₂ and other global warming pollution by as much as 80 percent by mid-century. We urge you to act without delay. We can avoid catastrophic impacts if we start reducing emissions now, but every year of delay and continued emissions growth makes the job much harder, locking us into the choice of making ever steeper emission reductions or suffering ever more severe impacts.
- The Clean Air Act is a powerful tool that should be used to begin reducing the vast majority of U.S. emissions of these heat-trapping pollutants. The Clean Air Act was designed to address not only the specific air pollutants known at the time of enactment, but also new threats that science identifies over time. With the Supreme Court's landmark decision in *Massachusetts v. EPA* one year ago, it is now settled that greenhouse gas emissions are subject to regulation under the Clean Air Act.
- For most of this administration EPA has done nothing except try to close the door on the Clean Air Act. And in the one year since the Supreme Court rebuked the administration for ignoring its authority, EPA has done nothing except develop a plan for further procrastination.
- The strategy that EPA is now following to avoid making an endangerment determination has already been rejected by the Supreme Court, which told EPA that it must make the endangerment decision for vehicle emissions considering only the science. The Supreme Court already rejected EPA's argument that it should not act on vehicles without a comprehensive strategy for addressing all greenhouse gas sources.
- It is completely practical to regulate greenhouse gas pollutants through a variety of Clean Air Act authorities pertaining to mobile and stationary sources. Through these authorities, EPA could set performance standards for global warming pollution from the vast majority of U.S. emissions sources. Electric power plants, for example, represent 40 percent of U.S. CO₂ emissions and could be regulated under Section 111. Other major industrial sources subject to Section 111 account for another 20 percent or so of these emissions. Motor vehicles and their fuels represent another 20 percent of U.S. CO₂ emissions and their fuels and could be regulated under Sections 202 and 211.
- NRDC does not recommend setting of a National Ambient Air Quality Standard for greenhouse gases and believes EPA has the discretion not to invoke this provision for pollutants ill-suited to control through ambient standards and state implementation plans.
- New Source Review should be applied to large sources of CO₂ and other greenhouse gases, such as proposed new coal-fired power plants. NRDC understands that EPA is exploring practical solutions to the application of these requirements to smaller sources.

**Testimony of David D. Doniger
Policy Director, Climate Center
Natural Resources Defense Council**

**Strengths and Weaknesses of Regulating Greenhouse Gas Emissions
Using Existing Clean Air Act Authorities**

**Committee on Energy and Commerce
Subcommittee on Energy and Air Quality
United States House of Representatives**

April 10, 2008

Thank you, Chairman Boucher, for the opportunity to testify today on using the Clean Air Act to curb the greenhouse gas emissions that contribute to global warming. My name is David Doniger and I am a senior attorney at the Natural Resources Defense Council (NRDC) and the policy director of our Climate Center. NRDC is a national, nonprofit organization of scientists, lawyers and environmental specialists founded in 1970, dedicated to protecting public health and the environment, with more than 1.2 million members and online activists nationwide and offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. During the 1990s, I served as counsel to the head of air program at the Environmental Protection Agency focusing on climate issues, and as member of the U.S. delegation to global warming treaty negotiations.

I am especially pleased to testify today because I have represented NRDC in a number of court cases and regulatory matters concerning EPA's authority to curb global warming pollution under the Clean Air Act, including the landmark Supreme Court case, *Massachusetts v. EPA*,¹ and the cases regarding California's clean car standards.

¹ 127 S.Ct. 1438 (2007).

Mr. Chairman, NRDC appreciates the Committee's commitment to producing global warming legislation. The committee's first White Paper very constructively outlined the major features of national cap-and-trade legislation and acknowledged the need to reduce CO₂ and other global warming pollution by as much as 80 percent by mid-century. We urge you to act without delay. Scientists tell us it is imperative not to let global average temperatures rise by more than another 2 degrees Fahrenheit. We can do this if we start reducing emissions now, but every year of delay and continued emissions growth makes the job much harder, locking us into a Hobson's choice of making ever steeper emission reductions or suffering ever more severe impacts.

This hearing, however, is about what the Executive Branch should be doing with the powerful legal tools that Congress has already provided in the Clean Air Act, our nation's comprehensive air pollution law. From the beginning four decades ago, the Clean Air Act was designed to adapt and respond to our changing understanding of the public health and environmental threats from air pollution – to address not only the specific air pollutants known at the time of each enactment, but also new threats to public health or the environment that science identifies over time. With the Supreme Court's landmark decision in *Massachusetts v. EPA* one year ago, it is now settled that greenhouse gas emissions are subject to regulation under the Clean Air Act. The Clean Air Act could be used to begin reducing the vast majority of U.S. emissions of these heat-trapping pollutants.

Yet for most of this administration EPA has done nothing except try to close the door on the Clean Air Act. And in the one year since the Supreme Court rebuked the

administration for ignoring its authority, EPA has done nothing except develop a plan for further procrastination.

EPA's Defiance of the Supreme Court

Mr. Chairman, today I will review the direct and broader implications of the *Massachusetts* decision, as the Committee has requested. But one thing needs to be emphasized at the outset. In that case, the Supreme Court already rejected the very same stratagem that EPA is following today. EPA says that before making the "endangerment" decision for motor vehicle emissions, it wants to mull over how greenhouse gases should be treated under all parts of the Clean Air Act. The Court has already ruled, however, that EPA may *not* delay the endangerment decision under Section 202 on that basis, and that EPA must make that decision on the science alone. Yet that is exactly what EPA is doing today.

It did not have to be this way. Indeed, it did not start out to be this way. Last May, the President responded to the Supreme Court decision by setting forth a laudable plan for EPA to make the endangerment determination by the end of December 2007, and simultaneously to propose standards for motor vehicles and their fuels under Sections 202 and 211 of the Act. We know from an investigation by the Oversight and Government Reform Committee that EPA devoted dozens of staff and millions of dollars to the effort and in fact completed all the work related to the endangerment decision last fall. The Administrator signed off on an affirmative decision and sent it to the White House. But then nothing happened.

The Administrator's actual judgment on the science of global warming is no longer a mystery. Just last month, in attempting to justify denial of the California waiver,

the Administrator published his formal conclusions that global warming poses serious dangers to public health and welfare all across the United States. For example, he found that “[s]evere heat waves are projected to intensify in magnitude and duration over portions of the U.S. where these events already occur, with likely increases in mortality and morbidity, especially among the elderly, young, and frail.”² The core premise for denying the California waiver is that vehicle emissions from all across the country are contributing to global warming impacts all across the country. Because this is not a valid reason to deny California the waiver under Section 209, NRDC has joined California, other states, and other environmental organizations in a lawsuit challenging the waiver denial. But at least the Administrator was candid about the science when explaining his decision *against* regulation.

Apparently, we cannot expect the same candor about the science *in favor of* regulation. Instead of issuing an affirmative endangerment decision as was planned last year, the Administrator has announced that his new plan is to issue an Advanced Notice of Proposed Rulemaking (“ANPRM”) sometime “later this spring” in order to invite further public comment on the science and on “the broader ramifications” of regulating greenhouse gases in relation to “the many relevant sections of the Clean Air Act.” Only at an unspecified time after the public comment period does the agency intend to “consider how to best respond to the Supreme Court decision.”³

EPA’s posture has left the state, local, and environmental petitioners in the *Massachusetts* case with no choice other than to go back to court to end the

² 73 Fed. Reg. 12,156, 12,167 (March 6, 2008).

³ Letter from Administrator Stephen L. Johnson to Chairman John Dingell and Ranking Member Joe Barton (March 27, 2008).

Administrator's defiance of the law. We are asking the Court of Appeals in Washington (the court now responsible for supervising EPA's compliance with the Supreme Court decision) to order EPA to issue the endangerment decision now being held hostage.

Applying the Clean Air Act to Greenhouse Gases

I turn now to this Committee's request for views on the application of various parts of the Clean Air Act to other heat-trapping pollutants. As I will show, regulation of these pollutants from a variety of mobile and stationary sources poses no special issues. And through these authorities, EPA could begin to reduce global warming pollution from the vast majority of U.S. emissions sources. Electric power plants, for example, represent 40 percent of U.S. CO₂ emissions and could be regulated under Section 111. Other major industrial sources subject to Section 111 account for another 20 percent or so of these emissions. Motor vehicles and their fuels represent another 20 percent of U.S. CO₂ emissions and their fuels and could be regulated under Sections 202 and 211.

In the few places where applying the Act to these pollutants raises more complex issues, NRDC believes it is possible for EPA to develop reasonable administrative solutions. We look forward to working with EPA on these issues. But we will not countenance further delay where action is both straightforward and overdue.

1. "Air Pollutant," "Public Health or Welfare," and "Endangerment"

To start, I would like to review three cross-cutting provisions: the definition of "air pollutant," the terms "public health or welfare," and the threshold criterion of "endangerment." The definitions apply across the entire Act, and the endangerment criterion is found in a large number of sections authorizing regulation of particular types of sources. The Supreme Court interpreted all three provisions in *Massachusetts*.

“*Air Pollutant.*” Section 302(g) provides a broad definition of air pollutant applicable across the Act. “Air pollutant” means:

any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

The Supreme Court held that greenhouse gas emissions “unambiguous[ly]” meet that definition:

On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt “physical [and] chemical ... substance[s] which [are] emitted into ... the ambient air.” The statute is unambiguous.

* * *

Because greenhouse gases fit well within the Clean Air Act's capacious definition of “air pollutant,” we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.⁴

“*Public Health or Welfare.*” Being largely self-explanatory, the term “public health” is not specifically defined in the statute, but the 1970 Senate Report explains the intent of Congress that EPA extend protection to sensitive groups within the general population, such as children and the elderly. So it should be apparent from the Administrator’s finding that global warming will lead to “likely increases in mortality and morbidity, especially among the elderly, young, and frail”⁵ that greenhouse gas emissions are contributing to decidedly adverse effects on public health.

⁴ 127 S.Ct. at 1460, 1462.

⁵ 73 Fed. Reg. 12,156, 12,167 (March 6, 2008).

Section 302(h) states that all language referring to “effects on welfare” includes effects on a comprehensive list of environmental attributes and values. The Supreme Court noted that the definition specifically includes effects on “weather” and “climate.”⁶ The inclusion of “weather” and “climate” in the 1970 Act reflects consideration of a report that year to Congress by the Council on Environmental Quality (CEQ). In a chapter on “Man’s Inadvertent Modification of Weather and Climate,” the CEQ report found that “Man can change the average atmospheric temperature slightly and thus significantly affect climate in at least seven ways: . . . He can increase the carbon dioxide content of the atmosphere by burning fossil fuels.” The CEQ report also noted scientific predictions even at that time that a rise of 2 to 3 degrees Fahrenheit “could lead to the start of substantial melting of ice caps and flooding of coastal regions.”⁷

Endangerment. In 1977 Congress adopted a uniform formulation for the threshold determination whether to regulate a new pollutant. Typically, the sections pertaining to regulation of particular types of sources state that EPA “shall” (sometimes “may”) prescribe standards for emissions of any air pollutants “which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” This highly precautionary standard reflects Congress’ intent that EPA proceed with regulation when the agency has evidence of significant danger to public health or welfare, notwithstanding the existence of some remaining scientific uncertainty.

⁶ 127 S.Ct. at 1447.

⁷ *Environmental Quality: The First Annual Report of the Council on Environmental Quality* (Aug. 1970), at 95.

The endangerment language was drafted in 1977 by this Committee, which explained its intention “to support the views expressed” in the landmark case upholding EPA’s regulation of lead in gasoline, *Ethyl Corp. v. EPA*.⁸ The Committee report stated “In order to emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator’s duty to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words ‘may reasonably be anticipated.’”⁹

The Committee retained the statutory reference to the Administrator’s “judgment,” emphasizing that the language was designed to “to affirm th[e] view” of court decisions that “have held that a substantial element of judgment, including making comparative assessment of risks, projections of future possibilities, establishing margins of safety and margins of error, extrapolating from limited data, etc., are necessary and permissible under the act.” The committee noted that it had “expressly rejected an amendment which would have deleted the[] words [“in his judgment”] and required a finding by the Administrator instead.”¹⁰

The question of endangerment is at the heart of the Supreme Court’s decision in *Massachusetts v. EPA*. That case concerned EPA’s denial of a petition asking for regulation of motor vehicles and motor vehicle engines. After deciding that EPA has authority to regulate greenhouse gases and that EPA had denied the petition for legally impermissible reasons, the Court ordered EPA to decide, on the basis of the science only,

⁸ 541 F.2d 1 (D.C. Cir. 1976). See H.R. Rep. No. 95-294, at 49.

⁹ *Id.* at 51.

¹⁰ *Id.* at 50-51.

whether greenhouse gases “in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

The Court made clear that EPA has only three options on remand: (1) to make an affirmative endangerment determination and commence the standard-setting process, (2) to make a negative endangerment determination by “determin[ing] that greenhouse gases do not contribute to climate change,” or (3) to provide “a reasoned justification for declining to form a scientific judgment.” Regarding the third option, the Court emphasized that any such justification would have to be grounded in the science only: “The statutory question is whether sufficient information exists to make an endangerment finding.” “If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.” Otherwise, it must make an affirmative or negative endangerment determination.¹¹

Given Administrator’s recent on the findings that global warming will lead to “likely increases in mortality and morbidity, especially among the elderly, young, and frail,”¹² it is hard to see how EPA could make any decision other than an affirmative endangerment determination.

2. Mobile Source Standards

The Committee has asked which sections of the Clean Air Act authorize greenhouse gas emission regulation. I will start with Title II, on mobile sources.

Section 202 – New Motor Vehicles and Engines. Section 202(a)(1) states as follows:

¹¹ 127 S.Ct. at 1462-63.

¹² 73 Fed. Reg. 12,156, 12,167 (March 6, 2008).

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

“New motor vehicles” and “new motor vehicle engines” are terms covering essentially all vehicles intended for road use, including automobiles, light trucks, heavy-duty truck and bus engines, and motorcycles. The 1999 rulemaking petition at issue in *Massachusetts* asked for regulation of all categories of motor vehicles and motor vehicle engines. So the regulatory decision that EPA must make on remand spans this range of vehicles and engines.

The Committee has asked what factors EPA may consider when setting standards under this provision. For cars and light trucks, Section 202(a)(2) provides that: “Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.” For heavy-duty engines, Section 202(a)(3)(A) provides that standards shall “reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.” Section 202(a)(4) also gives EPA authority to assure that the means used to comply with emission standards do not create “an unreasonable risk to public health, welfare, or safety in its operation or function.”

These direct EPA to set “technology-forcing” performance standards that reflect the reductions achievable by technology that can be incorporated into new vehicles or engines, taking into account lead-time needs and cost considerations.¹³ Applying this language poses no different issues for greenhouse gas emissions or conventional pollutants such as hydrocarbons or particulate matter. The process of assessing what is technologically achievable and at what cost are identical. One difference is that greenhouse gas standards will yield a substantial economic benefit to vehicle owners due to fuel savings, especially when gas prices are high. Because these cleaner, more efficient vehicles will be more attractive to consumers, they will be more profitable to the automakers.¹⁴

¹³ See, e.g., *NRDC v. USEPA*, 655 F.2d 318 (D.C. Cir. 1981).

¹⁴ The Supreme Court in *Massachusetts* resolved a special issue pertaining to Section 202, but not to other parts of the Clean Air Act. EPA argued that Section 202 did not extend to carbon dioxide (CO₂) emissions from automobiles and light trucks because this was supposedly the sole province of the Transportation Department under the fuel economy provisions of the Energy Policy and Conservation Act. The Court, however, ruled that the Administrator’s mandate to control emissions under the Clean Air Act is “wholly independent” from the mandate of the Transportation Department to set fuel economy standards under the Energy Policy and Conservation Act (EPCA): “[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities.” 127 S.Ct. at 1462. The Court continued:

EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. *But once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.* Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.

127 S.Ct. at 1462 (emphasis added, citation omitted). This ruling undercuts EPA’s current argument that it should consider the impact of the Energy Independence and Security Act (EISA) adopted last December before making an endangerment decision.

Section 211 – Regulation of Fuels. Section 211(c)(1) provides that:

The Administrator may, from time to time . . . by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle, motor vehicle engine, or nonroad engine or nonroad vehicle (A) if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare

This section allows the Administrator to adopt standards that reduce the carbon dioxide emissions from the combustion of fuel by reducing the fossil carbon content of fuels. A low-carbon fuel standard could be met by mixing into the fuel supply renewable sources of carbon. A low-carbon fuel standard under Section 211(c) would differ from the renewable fuel standard (RFS) set under Section 211(o) in that it would address the emissions of the entire fuel supply, not just the component of the fuel supply affected by the RFS.

Section 211(c)(2)(A) provides that when setting a low-carbon fuel standard, EPA would have to consider “all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 202.” The Administrator would also have to find under Section 211(c)(2)(C) that the “in his judgment” the regulation “will not cause the use of any other fuel or fuel additive which will produce emissions which will

EISA did not change the “wholly independent” status of the Clean Air Act and EPCA. Section 3 of EISA says: “Except to the extent expressly provided in this Act, or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.” Nothing in EISA expressly changes Section 202 or the *Massachusetts* decision and remand. Thus, whatever discretion EPA may have to coordinate with other agencies does *not* extend to withholding the overdue threshold determination of endangerment.

endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.”

Section 213 – Nonroad Engines and Vehicles. Section 213(a)(4) authorizes the Administrator to regulate greenhouse gases from nonroad engines and vehicles. It states:

If the Administrator determines that any emissions not referred to in paragraph (2) [which lists several conventional pollutants] from new nonroad engines or vehicles significantly contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, the Administrator may promulgate (and from time to time revise) such regulations as the Administrator deems appropriate containing standards applicable to emissions from those classes or categories of new nonroad engines and new nonroad vehicles (other than locomotives or engines used in locomotives) which in the Administrator’s judgment cause, or contribute to, such air pollution, taking into account costs, noise, safety, and energy factors associated with the application of technology which the Administrator determines will be available for the engines and vehicles to which such standards apply.

The standard-setting factors enumerated here are similar to those applicable under Section 202.

Section 231 – Aircraft Emission Standards. Section 231(a)(2) provides:

The Administrator shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Section 231(b) provides that “Any regulation prescribed under this section (and any revision thereof) shall take effect after such period as the Administrator finds necessary (after consultation with the Secretary of Transportation) to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.” With the addition of the consultation requirement, the criteria for standards resemble those in Section 202.

3. Stationary Sources

Section 111 – Standards of Performance for New Sources. Section 111 actually provides authority to regulate both new and existing stationary sources.

Section 111(b) (1)(A) requires the Administrator to publish, and from time to time revise, a list of categories of stationary sources and states: “He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” The Administrator is required by Section 111(b)(1)(B) set standards of performance for the new and modified sources in each category, and to review, and if appropriate, revise standards for each category at least every eight years.

Under Section 111(a)(1), a “standard of performance” means “a standard for emissions of air pollutants reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”

Section 111(d)(1) also directs EPA to establish regulations under which states submit a plan for establishing standards of performance for *existing* sources: “standards of performance for any existing source for any air pollutant (i) [not subject to a national ambient air quality standard] but (ii) to which a standard of performance under this section would apply if such existing source were a new source.” The state is permitted “to take into consideration the remaining useful life of the existing source to which such standard applies.”

EPA published a long list of source categories and initial round of standards for various pollutants in the early years of the program, but fell behind on conducting the required eight-year review. A number of parties demanded that EPA revise the standard for power plants by including emission standards for carbon dioxide, because power plants' CO₂ emissions – accounting for nearly 40 percent of total U.S. CO₂ emissions – may reasonably be anticipated to endanger public health and welfare. In 2003, EPA settled litigation over the overdue review of the power plant standard by agreeing to decide whether to include CO₂ emission standards in the revised standards. However, when EPA completed the review in 2004, the agency took the position – as it had with regard to motor vehicles – that it lacked any authority to regulate CO₂ emissions. States and environmental organizations challenged that decision in a case called *New York v. EPA*. After the Supreme Court's decision in *Massachusetts*, the Court of Appeals for the District of Columbia Circuit remanded the power plant standards back to EPA for a new decision on whether to add CO₂ emission limits to the power plant standards. To date, EPA has taken no action, and the petitioners are considering going back to the Court over the unreasonable delay.

EPA has also committed to decide on the inclusion of greenhouse gas emission standards in its review of the new source performance standard for petroleum refineries. The final decision on that review is due under a court ordered deadline later this month. The expectation is that EPA once again will decline to regulate these emissions, and this is likely to lead to another court challenge.

The Committee has asked whether EPA could establish a cap and trade standard for CO₂ and other greenhouse gases under Section 111. On this question, the legal

opinion issued by EPA general counsel Jon Cannon in 1998 (which ultimately prevailed in Massachusetts) also noted that none of the Clean Air Act provisions related to greenhouse gases “easily lends itself” to establishing a cap and trade program, and this is another reason why new cap and trade legislation is essential.¹⁵ Section 111, for example, provides for performance standards applicable to individual stationary sources. I understand that EPA may be reviewing the option of allowing sources subject to such performance standards to engage in trading, effectively raising the performance standard for some sources while lowering it for others.

From a policy perspective, this proposal does not pose the same dangers as earlier proposals to allow trading in mercury emissions. Mercury is highly toxic and a significant portion of mercury emissions are deposited locally in the immediate vicinity of each source. This makes emissions trading in mercury absolutely inappropriate. The U.S. Court of Appeals for the D.C. Circuit recently struck down EPA’s effort to remove mercury from regulation as a hazardous air pollutant under Section 112.¹⁶ Greenhouse gas emissions do not pose the same local toxicity concerns. From a legal standpoint, EPA has not yet made public its current analysis of legal issues regarding the potential use of trading for greenhouse gases under Section 111. We will look forward to evaluating the legal ramifications of EPA's potential approaches.

Sections 108-109 – National Ambient Air Quality Standards. Sections 108 and 109 provide for the setting of national ambient air quality standards (NAAQS) – atmospheric concentration limits that are deemed to protect public health with an

¹⁵ Memorandum from Jon Z. Cannon, General Counsel, to Carol Browner, Administrator, “EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources” at 4 (April 10, 1998).

¹⁶ *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

adequate margin of safety (primary standards), and to protect welfare (secondary standards). In the *Massachusetts* case, EPA expressed concern that the NAAQS system is not suited for use to control greenhouse gases. The agency's principal policy concern was that because greenhouse gas emissions mix globally to a nearly uniform concentration, it is not feasible for an individual state, or even a group of states, to limit the concentration in the air above those states by curbing their own emissions. While local emission reductions contribute to reducing global concentrations – indeed, there is *no other way* to control global concentrations – they do not effectively control local concentrations.

NRDC supports the use of the Act's source-specific performance standards – e.g., standards for vehicles and fuels under Section 202 and 211 and standards for power plants and other large stationary sources under Section 111 – because those measures contribute to reducing global loadings of the heat-trapping pollutants. As a policy matter, however, NRDC has not advocated using the NAAQS system for the same reasons expressed by EPA. Indeed, while a lawsuit to press for action under Section 108 was initiated and withdrawn several years ago, we know of no environmental organization or state that presently supports use of the NAAQS system for greenhouse gases or intends to pursue future legal action toward that end under Sections 108 or 109.

The Supreme Court found it unnecessary to address EPA's NAAQS concerns in *Massachusetts* because the case turned on Section 202 and did not require interpretation of Sections 108 and 109. Nonetheless, it is worth noting that the petitioners in *Massachusetts* (including NRDC) had suggested a distinction between Section 108 and the other authorities I have reviewed which EPA could argue supports a different

treatment of greenhouse gases than under the other sections. To be sure, Section 108(a)(1) establishes the same endangerment criterion that is found elsewhere:

For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare; ...

A second criterion – “(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources” – is clearly met by greenhouse gases. There is a third criterion, however. The pollutant must be one “(C) for which air quality criteria had not been issued before December 31, 1970, *but for which he plans to issue air quality criteria under this section*” (emphasis added). In the Petitioners’ brief in *Massachusetts* we said:

The NAAQS program and the mobile source program are also initiated by different regulatory triggers. Regulation of mobile sources is triggered under section 202(a)(1) by a determination that air pollution from motor vehicles “may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. 7521(a)(1). Although an endangerment decision of this kind is also a prerequisite to regulation under the NAAQS program, *see* 42 U.S.C. 7408(a)(1)(A), the NAAQS provision includes additional triggering language as well. *See, e.g.*, 42 U.S.C. 7408(a)(1) (requiring the Administrator to list new pollutants “for which he plans to issue air quality criteria”). This provision may allow more play in the joints than section 202(a)(1) permits. Of course, however, the extent to which such additional language gives EPA discretion to avoid listing pollutants that the agency believes are ill-suited to the NAAQS program is not before this Court.

This issue has not been addressed by EPA.

Sections 165 and 169 – New Source Review. A number of industries and lobbyists are pressing horror stories about the potential impact of regulating greenhouse gases due to the application of New Source Review (NSR). Under Section 165 and 169, new and modified “major stationary sources” are subject to a requirement to meet a

performance standard equivalent to the best available control technology (BACT). A “major stationary source” is any new source that emits or has the potential to emit more than 250 tons per year of a regulated pollutant. For modifications, EPA has the authority to define the triggering “significance” level by rule.

Some have expressed the concern that for CO₂ the 250-ton limit could result in coverage of a variety of sources whose conventional pollutant emissions fall below that limit. While there is some truth to this, this concern is being used as a smokescreen to draw attention away from dozens of proposed new large coal-fired power plants and other large industrial sources that are indisputably “major” and should be subject to NSR. These power plants and other large sources emit 5,000, 10,000, or more tons of CO₂ per year. NRDC considers that they are already subject to NSR for CO₂. The reason is that CO₂ is already a regulated pollutant under the Clean Air Act due to EPA’s emissions monitoring regulations established under Title IV of the Act and Section 821 of the 1990 Clean Air Act amendments. Thus, EPA is already required, in our view, to establish BACT for CO₂ emissions for new coal-fired power plants, and we and other organizations are pursuing that issue in challenges to PSD permits for several coal-fired power plants.

As for smaller sources, such as new commercial buildings, we understand that EPA is exploring regulatory means of adjusting the threshold levels. For example, general counsel Roger Martella was recently quoted as suggesting that EPA was considering establishing CO₂ thresholds at a higher level reflecting the ratio of CO₂ emissions to emissions of sulfur dioxide or other conventional pollutants. Another idea, recently suggested by Professor Lisa Heinzerling, is to establish class permits or a pre-

determined definition of BACT for these smaller sources. As I understand it, BACT for commercial buildings, schools, or hospitals could be defined as compliance with building energy efficiency codes and use of energy-efficient heating and cooling equipment (e.g., EnergyStar equipment).

NRDC is prepared to work with EPA to evaluate proposed solutions to the issue of smaller source coverage. But we will not countenance ignoring the indisputably major sources of CO₂, such as new coal-fired power plants.

4. Title VI Ozone Protection

Section 612 – Safe Alternatives Policy. Under this provision, EPA reviews the safety of alternatives to ozone-depleting chemicals. Section 612(c) provides:

Within 2 years after November 15, 1990, the Administrator shall promulgate rules under this section providing that it shall be unlawful to replace any class I or class II substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment, where the Administrator has identified an alternative to such replacement that--

- (1) reduces the overall risk to human health and the environment; and
- (2) is currently or potentially available.

The Administrator shall publish a list of (A) the substitutes prohibited under this subsection for specific uses and (B) the safe alternatives identified under this subsection for specific uses.

EPA has determined the phrase “reduces overall risk to human health and the environment” authorizes the Agency to regulate alternatives that contribute to global warming.

Conclusion

The Supreme Court’s decision in *Massachusetts v. EPA* has put to rest the question of EPA’s authority to curb global warming pollutants under the Clean Air Act. As I have described, the *Massachusetts* decision requires EPA to decide, on the basis of

science considerations only, whether motor vehicle emissions of greenhouse gases may reasonably be anticipated to endanger public health or welfare. Based on the Administrator's own recent evaluation of global warming science published in the Federal Register in March, EPA has no reasonable basis to withhold the endangerment determination any longer. The agency's current posture of avoiding that determination while continuing to mull over every aspect of the potential use of the Clean Air Act is an intolerable act of defiance of the Supreme Court decision.

A range of Clean Air Act provisions authorize technology-based, source-specific performance standards for greenhouse gas emissions – covering motor vehicle emissions, fuels, and stationary source categories, among others. Using these authorities, which are completely practical, EPA could make a major reduction in sources of the vast majority of U.S. global warming pollution.

The ultimate answer to curbing our global warming pollution is for this Congress to establish new national legislation to cap and cut these emissions. Yet much could have been done – and much could still be done – under the existing Clean Air Act. We cannot let EPA fiddle while the world burns.